

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

February 13, 2007 Session

STATE OF TENNESSEE v. RAYMOND LEE MCKINNIE

Direct Appeal from the Criminal Court for Wilson County

No. 04-0796 J.O. Bond, Judge

No. M2006-01237-CCA-R3-CD - Filed June 1, 2007

The defendant, Raymond Lee McKinnie, was convicted by jury of aggravated robbery and sentenced to fifteen years imprisonment. In this appeal, he argues that: (1) the evidence was insufficient to support his conviction; (2) there was erroneous and perjured testimony presented at trial; (3) a witness' reference to other pending cases and investigations was unduly prejudicial; and (4) the trial court erred in denying his motion for a new trial in light of newly discovered evidence. Following our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, JJ., joined.

Adam Wilding Parrish, Lebanon, Tennessee, for the appellant, Raymond Lee McKinnie.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Brian Fuller, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

This case arises out of the armed robbery of a Mrs. Winner's restaurant in Lebanon, Tennessee, on July 11, 2004, for which the defendant was indicted on one count of aggravated robbery. A jury trial was held on November 21, 2005, from which we summarize the following testimony.

Patricia Back, General Manager of the Mrs. Winner's restaurant in Lebanon, testified that on July 11, 2004, around 7:00 p.m. she was robbed at knife point while doing paperwork behind the service counter. She recalled that, at that time, there were no customers in the restaurant, and one

of her employees, Daniel Borrego, was cleaning the restrooms. Ms. Back remembered that a man walked into the restaurant, “popped his head around the corner and said he had to use the restroom and he’d be right back.” She stated that the man was black, “had a mustache, beard, short black hair” and was wearing a gray shirt and gray pants. She elaborated that the man’s facial hair looked like a short, unshaven beard, like he had not shaved in a few days.

Ms. Back testified that the man went down the hallway toward the restrooms, but soon after walked up to her, grabbed her arm, stuck a knife to her throat, and walked her to the cash register. Ms. Back noted that she was arm to arm with the man during the ordeal and was able to look at him during the encounter. The man took roughly \$220 from the register and left. Ms. Back identified the defendant as the man who robbed the Mrs. Winner’s.

Ms. Back recalled that a few days after the robbery, an officer showed her a photographic array but she was not able to pick out the perpetrator from the pictures; however, she was able to identify the perpetrator from another photographic array. Ms. Back said that she told the officer she was 90% certain the individual she picked out of the second set of photographs was the robber. In court, she stated that she was 100% certain the defendant was the man who robbed her. Ms. Back remembered that a couple of weeks after the robbery she met with a sketch artist, and after viewing the completed drawing she started crying and shaking because she “realized that [she] had just described the man that had robbed [her].” After she was shown the sketch in court, Ms. Back stated that there was no doubt in her mind that it was the defendant who robbed her.

On cross-examination, Ms. Back stated that she told the officers the robber had short hair, was about 5 feet, 9 inches tall, medium build, and weighed 170 to 180 pounds. She stated that to the best of her recollection she noticed no scars on the robber’s face, and she surmised that she “[p]robably” would have noticed if he had a substantial scar. When asked if she would have noticed if the robber had a goatee, she said she would have if it was well-groomed. Ms. Back acknowledged that the defendant was a rather dark-complected black man, but her composite sketch showed a relatively light-complected black man. When shown a picture of the defendant taken when he was brought into custody, Ms. Back noted that he had a scar or sore on his face. After being asked four different times, “If you found out that [the defendant] did not have hair then, nor has he ever had hair, would you feel that your description [of the robber’s hair] to the detective was accurate,” Ms. Back said probably not.

Daniel Borrego testified that on July 11, 2004, he was working at the Mrs. Winner’s restaurant and a robbery occurred around 6:00 or 7:00 in the evening while he was cleaning the restrooms. He recalled that he was opening the restroom door when a man came out and asked why the restaurant was so empty and what time they closed. Mr. Borrego responded that it was always slow that time of night and that they closed at 10:00 p.m. Mr. Borrego recalled that the man was wearing a white t-shirt and faded gray jeans. He said that the man was black and had a rugged, kind of prickly beard. The encounter lasted fifteen to twenty seconds. Mr. Borrego did not realize a robbery had occurred until after he finished cleaning the restrooms and the man had already left.

Mr. Borrego testified that he was shown a photographic array a few days after the robbery but did not see the robber in the photographs. Mr. Borrego then met with a sketch artist a week or two after the robbery. He identified the defendant in court as the person he saw in the restroom the night of the robbery and said he was 100% positive of his identification.

On cross-examination, Mr. Borrego testified that prior to doing the composite, he and Ms. Back discussed the robbery and they both said the same thing about the robber's race, facial hair, and clothing. Mr. Borrego stated that he did not notice any "facial oddities" about the robber's appearance, and he hypothesized that he would have noticed if the robber had a big scar on his face.

Officer Mike Bay with the Lebanon Police Department testified that he was responsible for investigating the July 11, 2004 robbery of the Mrs. Winner's restaurant. On July 17, 2004, Officer Bay showed Ms. Back a photographic array and, after looking for approximately fifteen seconds, she identified the robber out of the photographs. She said that she was 90-95% certain of her identification. Officer Bay noted that the picture identified by Ms. Back was of the defendant. On cross-examination, Officer Bay admitted that his report stated that Ms. Back's specific words were, "He looks like the guy who robbed me." On re-direct examination, Officer Bay looked at his report and then testified that Ms. Back said "he looks just like the guy" who robbed her.

Detective Sid Cripps with the Lebanon Police Department testified that he showed Ms. Back and Mr. Borrego a photographic array shortly after the robbery and neither were able to pick anyone out of the photographs. Detective Cripps later created a second array that included the defendant's picture, and it was shown to Ms. Back by Officer Bay. Detective Cripps stated that Mr. Borrego was never shown the array that included the defendant's picture.

On cross-examination, Detective Cripps stated that they never recovered the weapon or the stolen money. Three sets of latent prints were found at the crime scene but the results came back "nonrevealing." When asked if he spoke to other officers in conjunction with this investigation, Detective Cripps responded that he spoke to detectives working other investigations. When asked if a weapon was recovered from the defendant when he was taken into custody, Detective Cripps stated that the weapon came into play "as far as the witnesses of those other cases describing a weapon that matched the physical description of the weapon that [his] witness in [this] robbery" described. Detective Cripps was also asked if he recalled whether the defendant had a driver's license in his possession when he was taken into custody, to which he stated, "I know that he did have a Tennessee driver's license cause I seen it in the reports from the other cases, but as far as him having it in his possession, I have no idea." Detective Cripps acknowledged that the defendant never confessed or indicated that he was responsible for the robbery, nor was any physical evidence recovered linking the defendant to the robbery.

Detective Scott Massey with the Lebanon Police Department testified that he had the opportunity to talk to the defendant in the defendant's hotel room on July 17, 2004. They talked "about [the defendant's] physical appearance and the fact that he was bald." According to Detective Massey, the defendant "made the statement that he had hair early yesterday, and that he had shaved

his head yesterday[.]” Detective Massey looked in the bathroom and found a disposable razor and saw hair particles around the sink. Detective Massey noted that the defendant was bald and had a mustache and a small goatee the day he spoke with him.

On cross-examination, Detective Massey stated that he did not find any scissors in the defendant’s room, and the hair particles he found did not appear long enough to be a “small afro.” When the defendant was taken into custody, no weapon was recovered from his room. Detective Massey recalled that approximately \$150 was found in the defendant’s room, but he did not know if the money was traced to Mrs. Winner’s.

The defense called Mary Darlene Bates. Ms. Bates noted that she was currently incarcerated, but said that in July 2004 she had just gotten out of jail and was daily attending recovery meetings at the Fellowship House and Alcoholics Anonymous. Ms. Bates stated that she knew the defendant as “Prep,” and that he attended the recovery meetings on a daily basis as well. Ms. Bates recalled that the defendant looked the same as he did in July 2004. She said he was finely shaven and did not have any hair.

Upon the conclusion of the proof, the jury convicted the defendant as charged, and following a sentencing hearing, the trial court sentenced him to fifteen years in confinement. The defendant filed a motion for a new trial, which the trial court denied after a hearing.

ANALYSIS

On appeal, the defendant argues that: (1) the evidence was insufficient to support his conviction; (2) there was erroneous and perjured testimony presented at trial; (3) a witness’ reference to other pending cases and investigations was unduly prejudicial; and (4) the trial court erred in denying his motion for a new trial in light of newly discovered evidence.

Sufficiency

We begin our review by reiterating the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this court why the evidence will not support the jury’s verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no “rational trier of fact” could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); see Tenn. R. App. P. 13(e). In contrast, the jury’s verdict approved by the trial judge accredits the state’s witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v.*

Bland, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

“Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.” Tenn. Code Ann. § 39-13-401(a). The offense becomes aggravated robbery when it is accomplished with a deadly weapon or by displaying an article which is used to cause the victim to reasonably believe it is a deadly weapon, or when the victim suffers serious bodily injury. *Id.* § 39-13-402(a). The identity of the offender is an essential element of any crime. *Rice*, 184 S.W.3d at 662 (citing *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975)).

The defendant challenges the sufficiency of the convicting evidence. Specifically, the defendant alleges that there was insufficient proof of his identity as the robber. The defendant points out that neither witness was able to make an identification out of the initial photographic array. However, Detective Cripps testified that the first array did not contain a photograph of the defendant. Ms. Back was shown a second array, which contained the defendant's photograph, and she identified the defendant and said she was 90% certain of her identification. The witnesses provided descriptions for a sketch artist and the results of the sketches were almost identical. The sketches were entered as exhibits at trial and available for the jury's comparison to the defendant. Both Ms. Back and Mr. Borrego made in court identifications of the defendant as the robber and said they were positive of their identification.

The defendant contends that he did not match the witnesses' descriptions because he did not have hair at the time of the offense. He asserts that his driver's license photograph (taken two years before the robbery), his booking photograph, and the testimony from Ms. Bates prove that he was always bald with a goatee.

In his brief and at trial, the defendant repeatedly asserted that Ms. Back depicted the robber as having a “short afro.” Upon review of the record, we note that it was defense counsel who insisted on characterizing the robber as having a short afro. The witnesses both described the robber as having short hair. Moreover, Detective Massey testified that on the day the defendant was taken into custody, the defendant said that he had just shaved his head.

Identification of the defendant as the perpetrator of the offense is a question of fact for the jury. *State v. Strickland*, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993). A victim's identification alone is sufficient to support a conviction. *Id.* The jury heard the testimony at trial and by its verdict accredited Ms. Back and Mr. Borrego's identification testimony. Accordingly, the proof of the defendant's identity was sufficient, and the defendant is not entitled to relief.

As a corollary to this issue, we note that the trial court did not include any instructions on identity in its charge to the jury, which is troubling because the defendant's identity was a key issue in the case. In *State v. Dyle*, 899 S.W.2d 607 (Tenn. 1995), our supreme court held that whenever the identity of a defendant constitutes a material issue in the case, and defense counsel requests an identification instruction, such instruction must be given. *Id.* at 612. Otherwise, the failure to give the identification instruction is plain error. *Id.* However, the supreme court determined that if defense counsel fails to request the instruction when identity is a material issue, then such failure is to be reviewed under a harmless error standard. *Id.*; see Tenn. R. Crim. P. 52(a).

The record does not reveal that the defendant requested an identification instruction; therefore, the error does not amount to plain error. Accordingly, we must assess whether the trial court's failure to give an identification instruction affirmatively affected the result of the trial. See Tenn. R. Crim. P. 52. In this case, both witnesses adamantly testified that the defendant was the robber, and defense counsel vigorously cross-examined both witnesses about their identifications. Ms. Back identified the defendant out of a photographic array prior to trial. Neither witness made an identification out of an array that did not include the defendant's photograph. We also note that the trial court provided the jury with a thorough instruction on assessing the credibility of the witnesses. Thus, we conclude that the trial court's failure to give the jury an instruction on identity was harmless.

Perjured Testimony

The defendant argues that the trial court erred in denying his motion for a new trial because his conviction was based "largely, if not solely, upon erroneous/perjured testimony." Specifically, he argues that the witnesses' prior descriptions of the robber's hair, facial hair, and no scar were inconsistent with his actual appearance and thus inconsistent with the witnesses' in court identifications. The defendant also argues that Detective Massey's statement that the defendant admitted to having recently shaved his head was inconsistent with "all other evidence in the record," and at "a minimum . . . erroneous; at worse an intentional fabrication." ¹

Initially, we note that the defendant failed to cite to a single authority to support this argument and has therefore waived review of the issue. See Tenn. Ct. Crim. App. R. 10(b); Tenn. R. App. P. 27(a)(7). Even if not waived, however, the defendant is not entitled to relief. The defendant is asking this court to perform the function of the jury and make determinations as to the credibility of the two eyewitnesses who identified him and the detective who testified to his statement about having recently shaved his head. We note that these witnesses were subject to cross-examination. Assessing the credibility of the witnesses is the sole province of the jury, not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). By its verdict, the jury resolved all credibility determinations in favor of the state's witnesses. This issue is without merit.

Pending Cases

¹ Apparently, "all other evidence in the record" being that no shears or scissors were found in the defendant's room and the only hair found in the room were "particles consistent with [someone] shaving their face or head."

The defendant argues that the trial court abused its discretion in failing to declare a mistrial after Detective Cripps repeatedly referred to other pending cases and investigations against the defendant.

Before trial, the trial court instructed that the detectives who would be called as witnesses not discuss that there were other cases pending against the defendant. Detective Cripps made no mention of any other case on direct examination, but on cross-examination the following exchange took place:

Q. Now, I'm assuming that you spoke with detectives and all of that, the other officers on the street in conjunction with this investigation; is that correct?

A. Not officers on the street, but other detectives working these other investigations.

Q. Now, to your knowledge, was a knife recovered on [the defendant's] person when he was taken into custody?

A. I don't recall a knife. I'm not saying that there wasn't, but I don't recall a weapon ever being recovered.

Q. So no weapon, gun, knife or anything at this point, right?

A. The weapon came into play as far as the witnesses of those other cases describing a weapon that matched the physical description of the weapon that my witness in my robbery had described.

....

Q. . . . Do you recall if [the defendant] had a driver's license in his possession when he was taken into custody?

A. Like I said, I haven't looked at any of his evidence. I know that he did have a Tennessee driver's license cause I seen it in the reports from the other cases, but as far as him having it in his possession, I have no idea.

After the detective's last response, the trial court *sua sponte* dismissed the jury and cautioned the state's witness that there should be no further mention of other cases. The trial court also admonished defense counsel to "[b]e careful about what you ask him. If you ask him about something prior, you're going to get an answer." After the trial court's warning, cross-examination of Detective Cripps resumed without any further mention of other cases.

The determination of whether to grant a mistrial rests within the sound discretion of the trial court. *State v. Smith*, 871 S.W.2d 667, 672 (Tenn. 1994). The reviewing court should not overturn that decision absent an abuse of discretion. *State v. Reid*, 91 S.W.3d 247, 279 (Tenn. 2002). A mistrial is usually appropriate in a criminal case only where there is a “manifest necessity.” *Arnold v. State*, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which prevents an impartial verdict. *Id.* The burden of establishing the necessity for mistrial lies with the party seeking it. *State v. Williams*, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996).

Here, we note that the defendant never requested that the court declare a mistrial, but even if he had, that decision rests within the sound discretion of the trial court. During the jury-out hearing, the trial court specifically noted that “I don’t think [Detective Cripps’ answers have] hurt the jury yet, that’s the reason I stopped it. It was getting to the [point] where you’d have to have a mistrial.” Thus, the trial court determined that there was no manifest necessity for a mistrial at that point, and the defendant has failed to prove that Detective Cripps’ responses prevented the jury from rendering an impartial verdict. It is our view that the trial court properly stopped the line of questioning before the jury was prejudicially affected, and we discern no abuse of the trial court’s discretion.²

Newly Discovered Evidence

The defendant lastly argues that the trial court erred in not granting his motion for a new trial after he uncovered newly discovered evidence that “conclusively contradicts evidence presented at trial.” The defendant’s trial took place in November 2005. Over the Thanksgiving holiday, members of the defendant’s family gathered together and “by pure chance” someone realized there was an undeveloped half roll of film taken on the July 4th holiday. The defendant argues that these photographs, taken seven days before the robbery, “clearly establish that he was completely bald, and clean-shaven except for a finely groomed ‘goatee.’” The defendant also argues that continued investigation after the trial led to the discovery of two unrelated witnesses who remembered the July 4th celebration and could identify the parties in the newly discovered photographs. The trial court heard the parties’ arguments at the hearing, accepted the photographs as exhibits, and then denied the defendant’s motion for a new trial.

To be entitled to a new trial on the basis of newly discovered evidence, a defendant must show (1) that he or she used reasonable diligence in seeking the newly discovered evidence; (2) that the new evidence is material; and (3) that the new evidence will likely change the result of the trial. *See State v. Nichols*, 877 S.W.2d 722, 737 (Tenn. 1994). Whether to grant a new trial on the basis of newly discovered evidence lies within the sound discretion of the trial court. *See State v. Caldwell*, 977 S.W.2d 110, 117 (Tenn. Crim. App. 1997). Accordingly, we review this issue for an abuse of discretion. *See State v. Meade*, 942 S.W.2d 561, 565 (Tenn. Crim. App. 1996).

² We note that this issue is arguably waived because the defendant failed to request a curative instruction or a mistrial. *See* Tenn. R. App. P. 36(a).

Even assuming the defendant was diligent in seeking the photographs and the photographs are material, we conclude the defendant has failed to prove that the newly discovered photographs would have likely changed the result of the trial. The pictures are rather blurry and it is hard to discern whether the defendant's head is bald or if his hair is just closely cropped. One picture is so blurry that it is hard to tell whether it is even the defendant in the photograph. In any event, even if the pictures demonstrated that the defendant's head was shaven, this would not preclude him as the person who committed the robbery because the description given by the witnesses was of a man with short, black hair. In a week's time, the defendant could have grown enough hair to fall under that description. The defendant is not entitled to relief.

CONCLUSION

Based upon the aforementioned reasoning and authorities, we affirm the judgment of the Wilson County Criminal Court.

J.C. McLIN, JUDGE